UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No.: 1:16-CV-05654

[Pleading Title]

UNDERDOG TRUCKING, LL.C,and

REGGIE ANDERS,

Plaintiffs,

vs.

VERIZON COMMUNICATIONS INC.,

CELLCO PARTNERSHIP D/B/A VERIZON

WIRELESS,

REVEREND AL SHARPTON,

NATIONAL ACTION NETWORK,

DOES 1 THROUGH 9,

Defendants.

Memorandum of Law in Opposition to the Motion of Defendants Reverend Al Sharpton and National Action Network to Dismiss Plaintiffs' Third Amended Complaint

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1. INTRODUCTION AND RESTATEMENT OF FACTS

Reggie Anders and Underdog Trucking LL.C (Jointly referred to hereinafter as "Plaintiffs"), are filing this memorandum of law in opposition to the motion to dismiss filed by Defendants Reverend Al. Sharpton and the National Action Network (Jointly referred to hereinafter as "Defendant's").

Defendants have completely misunderstood the issues in this case and also seem to have misunderstood the history of it.

This action is not a re-litigation the 2009 and 2010 cases which were clearly filed under 42 U.S.C. § 1983. Those actions together with their particular issues and claims were disposed of and are not a part of the present action.

This action is based on breach of contract and tortious interference in a contract respectively against the various defendants herein. The matter is before this court on the basis of diversity jurisdiction.

The facts giving raise to the claims in this suit are distinct from any previous claims as between the parties herein.

2. SERVICE WAS PROPERLY EFFECTED

In the December 8, 2016 telephonic pre-motion conference, the Defendant's then counsel, Michael Hardy, raised the issue of service and it was addressed by the court. The court clearly made an oral order that Plaintiffs serve the initial complaint again to cure the service defect and granted leave to file a second amended complaint by January 9th, 2017. The court, if I remember correctly, said to the Plaintiffs something to the effect" I will grant you leave to file a second amended complaint but meanwhile you need to serve the first complaint to cure the service issue before you do that".

The oral order seems not to have made it into minute entry.

The court has authority, if it remains unclear whether or not an extension of time to serve was granted, to grant a request, which is hereby made, for a second time, under Rule 4(m).

Under Rule 4(m), if a defendant is not served within 120 days of filing the complaint, the court must dismiss the action without prejudice or order that service be made within a specified time. "[I] f the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." In determining the existence of good cause, courts consider whether the plaintiff made reasonable efforts to serve the defendant and whether the defendant was prejudiced by the delay. "Good cause or excusable neglect is generally found only in exceptional circumstances where plaintiff's failure to serve process in a timely manner was the result of circumstances beyond his control." See *McKibben v. Credit Lyonnais*, 1999 WL 604883, at (SDNY Aug. 10, 1999). Even in the absence of good cause a court may, in its discretion, extend the time to serve, based on factors including whether: 1) the statute of limitations would bar refiling; 2) the defendant had actual notice of the claims; 3) the defendant attempted to conceal the defect in service; or 4) the defendant would be prejudiced by an extension of the time to serve. See 17. *DeLuca v. AccessIT Group, Inc.*, ___ F.Supp.2d ___, 2010 WL 447114, (SDNY Feb. 9, 2010).

The court's order of 12/08/2016 satisfies the requirements of Rule 4(m). [See Exhibit A].

The Plaintiff caused to be served upon the defendants the complaint and summons in this action on 12/20/2017.

The summons and complaint were delivered to HeavenSent Legal Services who through their staff one Mr. Mohamed Bouri, first attempted service on 12/16/2017 at the Defendants business address at 106 W. 145th Street, New York, NY 10039. On the first attempt, he was informed that no one was authorized to accept service. This is a strange occurrence bearing in mind that the subject address is the business for both defendants. The server returned again on 12/20/2017 and properly served the summons and complaint on the defendants through their staff member KOFI ADUSEI. [EXHIBIT B].

Defendants have filed an affirmation sworn by Patrice Perry [Doc 87] and an employment record for KOFI ADUSEI.

On the record, there are two dueling affirmation in Support of Motion [Doc 87], and [Exhibit B], affidavit of service sworn by Mohamed Bouri. Both cannot be true.

The record of employment for KOFI ADUSEI [Document 87-1] is a self serving document which obscures his date of birth and alternately says that Mr. Adusei quit and also that he was terminated. It also contains a statement that says 'rehire'. Plaintiffs are suspicious of the authenticity of this document and will require its maker to testify at the hearing of the requested Traverse motion. The affidavit of Patrice Perry [Document 87] does not explain how the process server came up with the name Kofi Adusei as the person who accepted service on behalf of the defendants. Exhibit B and documents 87 and 87-1 cannot all be true. This is a matter that can only be resolved by a traverse hearing under New York Laws.

It would be hard to believe that Mohamed Bouri, the process server, came up with the name KOFI ADUSEI out of the blue and described KOFI ADUSEI in such detail as shown on the affidavit of service [Exhibit B].

The proper way to resolve the matter of service in New York is to conduct a traverse hearing. The Plaintiffs will move this court to schedule a Traverse hearing to determine the veracity of otherwise of the affidavit of service. Plaintiffs will also move this court for sanctions upon any individual found to have filed a false affirmation or affidavit. This should include any person who may have assisted, counseled or encouraged the filing of a false affidavit or affirmation.

3. THE PLAINTIFFS' PRIOR LAWSUITS

The referenced prior actions are wholly irrelevant to this action. This action is not in any way related to the 1009 and 2010 actions. The 2009 and 2010 suits only provide a historical context for the contract, subject of the present suit.

The present suit does not seek litigate the issues in the 2009 and 2010 suits nor does it raise the same claims.

4. THE PLAINTIFFS' HAVE ALLEGED AN ENFORCEABLE CONTRACT

Plaintiffs have alleged an enforceable contact in the Third Amended Complaint [Document 81]. In July 2014, the Plaintiffs began negotiations with the Defendants which negotiations yielded a contract [TAC paragraphs 13-16].

The terms of the contract were as follows:

i) The Plaintiffs were to pay the Defendants $16000, which they did.

ii) In return, Defendants would ensure that Al Sharpton would highlight unfair and discriminatory practices by Verizon Communications Inc., and Cellco Partnership D/B/A Verizon Wireless, through his TV show on MSNBC "Politics Nation"; his nationally syndicated radio show "Keepin' it Real with Al Sharpton"; press conferences as well as mediation with Verizon Communications

Plaintiffs have alleged that they kept their part of the bargain by handing the Defendants the $16000.00.

A breach of contract occurred when the defendants failed to carry out any part of their bargain resulting in direct financial losses and many incidental and consequential losses and damage.

Plaintiffs are prepared to lead evidence to prove each alleged element under New York law and would bring out all the facts by way of pre-trial discovery.

The Defendant's motion to dismiss does not deny that $16000 was paid to the Defendants by the Plaintiffs. Plaintiffs have alleged and will prove the existence of the oral contract and also the fact that at the very least, Defendants benefitted from the oral contract while Plaintiffs only incurred losses as a consequence of the breach.

Oral contracts are enforceable in New York.

An oral agreement may be enforceable as long as the terms are clear and definite and the conduct of the parties evinces mutual assent "sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (Matter of *Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]; *Carlsen v Rockefeller Ctr. N., Inc.*, 74 AD3d 608 [1st Dept 2010]). However, not all terms of a contract need be fixed with absolute certainty, and courts will not apply the doctrine of indefiniteness to "defeat the reasonable expectations of the parties in entering into the contract" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], cert denied 498 US 816 [1990]).

Where "there may exist an objective method for supplying the missing terms needed to calculate the alleged compensation owed plaintiff," a claimed oral agreement is "not as a matter of law unenforceable for indefiniteness" (*Basu v Alphabet Mgt.* LLC, 127 AD3d 450, 450 [1st Dept 2015]; *Abrams Realty Corp. v Elo*, 279 AD2d 261 [1st Dept 2001], lv denied 96 NY2d 715 [2001]). See also *Kramer v. Greene Appellate Division of the Supreme Court of the State of New York*·2016 NY Slip Op 05776 (N.Y. App. Div. 2016).

Through discovery. All the facts of the case can be developed to prove the terms of the oral contract.

5. STANDARD FOR MOTIONS TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

In deciding a motion to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in the plaintiff's favor. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007); *S.E.C. v. Lyon*, 529 F. Supp. 2d 444, 449 (S.D.N.Y. 2008). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."). To state a plausible claim to relief, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

The Court's function on a motion to dismiss is not to "weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir.1985).

A complaint will survive a motion under Fed. R. Civ. P. 12(b)(6) if it states plausible grounds for Ochre's entitlement to the relief sought, id. at 1965-66, i.e., it need merely contain sufficient factual allegations to raise a right to relief above the speculative level, id. At 1965. The issue before the Court upon consideration of such a motion is not whether Ochre "will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *McDowell v. N. Shore-Long Island Jewish Health Sys., Inc.*, 839 F. Supp. 2d 562, 565 (E.D.N.Y. 2012) (citing to *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir.2001)).

When the complaint contains well-pleaded facts, the "court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."-*Twombly.*

The Plaintiff's TAC is well pleaded and contains no conclusory statements. It explains exactly how the contract was negotiated, what the terms were and what conduct of the Defendants constituted breach of contract.

The TAC raises more than plausible claims and the Plaintiffs are entitled to offer proof. At the very least, there are sufficient pleadings to show that an enforceable contract was formed, did exist and Plaintiffs provided consideration in the furtherance of that contract.

6. PROPER SERVICE WAS MADE

Proper service was made on 12/20/2016 and an affidavit of service is on the record. This dispute can be resolved by the scheduling a Traverse action. That request will be made through a separate motion.

From the affidavit of service on record, it can be discerned that Defendants were actively evading service. The process server Mr. Mohamed Bouri has stated that at the first attempt, he went to the Defendant's place of work to serve the summons and complaint and was informed that no person was authorized to accept service.

This court could take notice that Defendant's prior counsel, Michael Hardy, stated on the record that his address was exactly the same address as the Defendants and is designated as the General Counsel for the Defendants. Mr. Michael Hardy was at the pre-motion conference on 12/08/2016 where this court granted leave to serve the complaint and it would be hard to believe that no person at the Defendant's business address which included Mr. Hardy's office, was authorized to accept service or was aware of this action. This evasion of service had unnecessary financial consequences as a result of the server having to make a second trip on 12/20/2016. Service was properly accomplished at the second attempt.

Defendant's must not be permitted to evade service this way.

This court also has authority under Rule 4(m) to grant leave to serve the initial complaint yet again if necessary or by another means incapable of evasion by the Defendants.

7. THIS IS NOT AN ACTION TO SETTLE THE DISMISSED 2009 AND 2010 ACTIONS

The present action is not to settle the dismissed 2009 and 2010 actions. This is a distinct action that is entirely based on breach of contract that has nothing to do with the issues or claims in the 2009 and 2010 suits.

The Contract subject of this action was not to solicit a new business relationship between Plaintiffs and the Verizon Defendants. It was a contract to essentially highlight Defendants Verizon Communications Inc. and Cellco Partnership D/B/A Verizon Wireless' discriminatory and unfair business practices in the media for a fee. This was not a contract to commit extortion, Plaintiffs have a first amendment right to communicate publicly their experiences doing business with Verizon Communications Inc. and Cellco Partnership D/B/A Verizon Wireless.

Black's Law Dictionary, Sixth Edition, p. 585 defines extortion as the obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Clearly, there was no extortion that can be reasonably found in the Plaintiff's conduct.

8. JURISDICTIONAL REQUIREMENTS OF THIS COURT

This court has diversity jurisdiction in this action because Plaintiffs in good faith sufficiently pleaded damages for breach of contract and tortious interference with a contract fact.

The TAC has set forth facts in sufficient detail and in good faith that though the original contract involved $16,000, there were many consequential and incidental losses. Reggie Anders made multiple trips to New York City from Arizona in pursuance of the subject contract including paying for hotel rooms, transportation and other expenses over a long period of time. (see TAC paragraphs 46-47).

"Where a plaintiff is seeking unliquidated damages in tort for violation of her right of privacy, recovery for such a violation encompasses both emotional damages and economic damages. In such cases, it is appropriate to permit the case to proceed and not predetermine whether a plaintiff can recover a minimum statutory amount for purposes of diversity jurisdiction." *Hoepker v. Kruger*, 200 F. Supp. 2d 340, (S.D.N.Y. 2002).

"The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The fact that the plaintiff may not recover the minimum jurisdictional amount, or that a valid defense to the claim may exist, does not show the plaintiff's bad faith or oust the jurisdiction. Similarly, a district court's jurisdiction is not ousted simply because the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount." *Williams v. New York State Livery Serv.*, 1995 U.S. Dist. LEXIS 11773, *1, 1995 WL 491485 (S.D.N.Y. Aug. 17, 1995)

"We are mindful that plaintiff may not ultimately recover an amount in excess of the jurisdictional minimum. However, we must reiterate that we are not permitted to evaluate the merits of plaintiff's claims on this motion. No matter how persuasive defendants' attorney's interpretation of plaintiff's physical condition may be to a jury, we cannot weigh the facts in determining the amount in controversy. Instead, we may only dismiss plaintiff's complaint if he fails to allege a good faith recovery sufficient to meet the demands of § 1332(a). We cannot say, to a legal certainty, that plaintiff has failed to meet that burden. Therefore, we must deny defendants' motion." *Kry v. Poleschuk,* 892 F. Supp. 574 (S.D.N.Y. 1995).

At this stage, the court need only consider the good faith pleadings and not weigh what evidence might or might not be brought to prove the amount in controversy especially considering that no opposing pleadings have been filed to controvert the allegations made in the TAC.

9. CONCLUSION

The TAC ought not be dismissed and Plaintiffs ought to get the opportunity to bring the full merits of their claims. The motion to dismiss should be denied.

Dated this 19th day of April 2017

s/Japheth N Matemu
Matemu Law Office P.C
Attorneys for Plaintiffs
Reggie Anders and
Underdog Trucking LL.C
5640 Six Forks Road, Suite 201
Raleigh, NC 27609
(984) 242-0740

CERTIFICATE OF SERVICE

I hereby certify that an exact and true copy of the foregoing has been filed electronically on this 19th day of April, 2017. Notice of this filing will be sent to all parties via ECF:

Dated this 19th day of April 2017.

s/japheth n. matemu
Japheth N. Matemu

AFFIDAVIT OF SERVICE

Case: 1:16-CV-05654-VSB	Court: UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK	County: , NY	Job: 1143104 (773363)
Plaintiff / Petitioner: UNDERDOG TRUCKING LLC, ET AL.		Defendant / Respondent: REVEREND AL SHARPTON, ET AL.	
Received by: Mohamed Bouri - 1278466		For: Heaven Sent Legal Services	
To be served upon: NATIONAL ACTION NETWORK			

I, Mohamed Bouri, being duly sworn, depose and say: I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to make service of the documents and informed said person of the contents herein

Recipient Name / Address: KOFI ADUSEI AUTHORIZED TO ACCEPT, Company: 106 W 145TH ST, NEW YORK, NY 10039

Manner of Service: Business, Dec 20, 2016, 12:18 pm EST - Corporate Service

Documents: SUMMONS IN A CIVIL ACTION, CIVIL COVER SHEET, AMENDED COMPLAINT, (Received Dec 9, 2016 at 1:29pm EST)

Additional Comments:

1) Unsuccessful Attempt: Dec 16, 2016, 4:38 pm EST at Company: 106 W 145TH ST, NEW YORK, NY 10039
NO ONE HERE AUTHORIZED TO ACCEPT SERVICE

2) Successful Attempt: Dec 20, 2016, 12:18 pm EST at Company: 106 W 145TH ST, NEW YORK, NY 10039 received by KOFI ADUSEI AUTHORIZED TO ACCEPT. MALE, BLACK SKIN, BLACK HAIR, 29-35 YEARS OLD, 5'10, 180 LBS

STATE OF NEW YORK
COUNTY OF KINGS

Subscribed and sworn to before me by the affiant who is personally known to me.

[signature] 12-20-16
Mohamed Bouri - 1278466 Date

[signature]
Notary Public

12/20/16 11/21/2017
Date Commission Expires

CHARLES E. SEGURE, JR.
Notary Public - State of New York
No. 01SE6136197
Qualified in Kings County
My Commission Expires November 21, 2017
Certificate on file Kings County

AFFIDAVIT OF SERVICE

Case: 1:16-CV-05654-VSB	Court: UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK	County: , NY	Job: 1143101 (773362)
Plaintiff / Petitioner: UNDERDOG TRUCKING LLC, ET AL.		Defendant / Respondent: REVEREND AL SHARPTON, ET AL.	
Received by: Mohamed Bouri - 1278466		For: Heaven Sent Legal Services	
To be served upon: REVEREND AL SHARPTON			

I, Mohamed Bouri, being duly sworn, depose and say: I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to make service of the documents and informed said person of the contents herein

Recipient Name / Address: KOFI ADUSEI AUTHORIZED TO ACCEPT, Company: 106 W 145TH ST, NEW YORK, NY 10039

Manner of Service: Substitute Service - Personal, Dec 20, 2016, 12:18 pm EST

Documents: SUMMONS IN A CIVIL ACTION, CIVIL COVER SHEET, AMENDED COMPLAINT, (Received Dec 9, 2016 at 1:29pm EST)

Additional Comments:
1) Unsuccessful Attempt: Dec 16, 2016, 4:38 pm EST at Company: 106 W 145TH ST, NEW YORK, NY 10039
NO ONE HERE AUTHORIZED TO ACCEPT SERVICE

2) Successful Attempt: Dec 20, 2016, 12:18 pm EST at Company: 106 W 145TH ST, NEW YORK, NY 10039 received by KOFI ADUSEI AUTHORIZED TO ACCEPT. MALE, BLACK SKIN, BLACK HAIR, 29-35 YEARS OLD, 5'10, 180 LBS

STATE OF NEW YORK
COUNTY OF KINGS

Subscribed and sworn to before me by the affiant who is personally known to me.

[signature] 12-20-16
Mohamed Bouri - 1278466 Date

[signature]
Notary Public
12/20/16 11/21/2017
Date Commission Expires

CHARLES E. SEGURE, JR.
Notary Public - State of New York
No. 01SE6136197
Qualified in Kings County
My Commission Expires November 21, 2017
Certificate on File Kings County

Gmail

Jeff Nthautha <jnmatemu@gmail.com>

Activity in Case 1:16-cv-05654-VSB Anders et al v. Verizon Communications Inc. et al Pre-Motion Conference

1 message

NYSD_ECF_Pool@nysd.uscourts.gov <NYSD_ECF_Pool@nysd.uscourts.gov> Fri, Dec 9, 2016 at 2:48 PM
To: CourtMail@nysd.uscourts.gov

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U.S. District Court

Southern District of New York

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Case Name: Anders et al v. Verizon Communications Inc. et al
Case Number: 1:16-cv-05654-VSB
Filer:
Document Number: No document attached

Docket Text:
Minute Entry for proceedings held before Judge Vernon S. Broderick: Pre-Motion Conference held on 12/8/2016. Plaintiff is hereby granted permission for leave to file a Second Amended Complaint by 1/9/2017. (Court Reporter Jennifer Thune) (msa)

1:16-cv-05654-VSB Notice has been electronically mailed to:

Raymond G. McGuire mcguire@kmm.com, amcguire@kmm.com, court@kmm.com

Todd Lawrence Schleifstein (Terminated) schleifsteint@gtlaw.com, NJLitDock@gtlaw.com

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Japheth Nthautha Matemu jnmatemu@gmail.com

1:16-cv-05654-VSB Notice has been delivered by other means to: